

The FCC's ability to preempt state jurisdiction is specifically limited to that *necessary* to achievement of its goal and the FCC bears the burden of showing with specificity that state provisions negate the federal policy by, for example, demonstrating that severability is impossible. Courts have found, for example, that state action denying physical interconnection cannot be severed from interstate service because failure to interconnect precludes both interstate and intrastate service. See Public Util. Comm'n of Texas v. Federal Communications Comm'n, 886 F.2d 1325, 1333-1334 (D.C. Cir. 1989) (noting that technological inseparability of interstate and intrastate calls is insufficient to justify preemption "unless that technological inseparability also prevents the FCC from separating its regulation into interstate and intrastate components"; absent a showing of inseparability, FCC must limit its regulation to interstate aspects); PSC of Maryland, 909 F.2d at 1516 (affirming FCC authority to preempt states from setting rates charged by LECs to interexchange carriers for disconnection of subscribers' service, because *inter alia*, the service *cannot be unbundled*; to disconnect a customer's local service for non-payment of his interexchange bill, an LEC must also disconnect his interstate service); NARUC v. FCC II, 880 F.2d 422, 430 (emphasis added) ("We conclude, therefore, that the Commission may take appropriate measures in pursuit of that goal, *but only to the degree necessary to achieve it . . .*").

In contrast, rate regulation is typically severable. As recognized in Louisiana PSC, 476 U.S. at 375-76, different ratemaking methodologies can readily be accommodated by separating the costs between intrastate and interstate service and letting each regulatory body set rates within regulatory sphere. Compare People of the State of California v. Federal Communications Comm'n, 4 F.3d 1505 (9th Cir. 1993) (FCC acted in accordance with Louisiana PSC in respecting the dual system of regulation established by Congress by requiring Bell Operating Companies to offer Basic Service Elements ("BSE") technically compatible with interstate service in conjunction with interstate Basic Serving Arrangements ("BSA"), and prohibiting mixing and matching of interstate BSEs and intrastate BSAs, while not preempting the states from setting rates for those BSEs that are used for intrastate services).

Various commentators have argued that CMRS service is inherently interstate because service areas are not based on state boundaries, some transmission towers may provide service across jurisdictional boundaries and calls may be inappropriately labeled where the CMRS user is near a state border or crosses a state border. See, e.g., Comments of Vanguard

³²/(...continued)

system alone, nearly \$50 million in revenues is at stake. These rates cover both the direct and indirect costs of terminating CMRS calls to LEC subscribers, as determined by state regulators. The indirect costs are those common costs which generally benefit all network users, including CMRS providers, such as the cost of achieving universal service, which has value to CMRS subscribers, as well as wireline carriers' subscribers, by expanding the population that can be reached. The states' exercise of authority over intrastate rates pursuant to 47 U.S.C. Section 152(b) is critical to assuring these goals can be met.

Cellular Systems, Inc. at 25; Comments of Sprint Spectrum and American Personal Communications at 47-48; Comments of Personal Communications Industry Associations at 19; Comments of Nextel Communications, Inc. at 15. However, the case for inseverability rests on selected examples, generally involving situations in which CMRS providers may not collect data needed to determine whether a particular mobile call is interstate or intrastate or highly unusual situations, such as cross-border towers. The danger in relying on such isolated examples is that the Commission may lose the regulatory forest for the trees. To the extent there is any current absence of "measurability," it is caused by previous determinations of the Commission that CMRS is "local" in nature, which negated the need for real-time measurement. With the prospect of bill and keep so near at hand, CMRS providers have a great disincentive to gather this data. In any event, implementation of wireless adapted SS-7 protocols will provide substantial call detail in the future.

However, the Commission does not need to require the development of call-specific data; it can resolve severability issues in the same manner that countless important ratemaking determinations are made. As set forth in the NYNEX Comments at 40, there has been no factual showing that traffic studies cannot be used to apportion interconnection traffic by jurisdiction. Such studies are customarily used for ratemaking, such as in setting rates for termination of interexchange traffic. NYNEX Comments, at 40 n.63. Such studies can estimate the degree to which calls are made in interstate commerce and can readily identify the number of calls made through the relatively few cross-border towers and allocate such calls (and the associated cost and revenues) between the interstate and intrastate domains.^{33/} For example, in the case of the caller who makes a call from another jurisdiction, CMRS providers could, if they wish, gather call-specific data that would permit the call to be identified as intrastate or interstate. For example, Western Wireless Corporation identifies the portion of its traffic that is interstate versus intrastate. Comments of Western Wireless Corporation at 12. As made clear from its discussion, common facilities are used to transport both interstate and intrastate calls, and the location of the facilities may not correspond to the service rendered; *i.e.*, an intrastate call may be routed over facilities located in another state. *Id.* But, nevertheless, a determination of the nature of the traffic can be made, and that determination would be the basis for a separations determination. Jettisoning state regulation of intrastate calls originating with CMRS providers and terminating on LEC networks based on these examples would be particularly inappropriate, because, as the Commission itself has found:

Although we find that we have plenary jurisdiction over the physical interconnections between cellular and landline carriers, *the actual costs*

^{33/} This allocation of responsibilities, which gives a preeminent role to State commissions, is consistent with the Commission's previous determination that CMRS-LEC interconnection rates are largely a matter of state, not federal concern. See In re Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408, 5453 (1994).

and charges for the physical interconnections [cite omitted] of cellular systems are suited to dual intrastate and interstate regulation. "Changes applicable" to cellular interconnection are separable. As with telephone plant depreciation costs [at issue in Louisiana PSC], it is possible to divide the actual interstate and intrastate costs of cellular interconnection. . . . Although we are not mandating a jurisdictional separations process for the cellular service unless it becomes necessary to do so, we emphasize that our jurisdiction is limited to the actual interstate cost of interconnection and ensuring that interconnection is provided for interstate service. [Cite omitted].^{34/}

Although the 1993 Budget Act expanded the Commission's authority as to the rates charged by CMRS providers, the Commission's 1987 analysis as to severability still holds true; rates charged by LECs to CMRS providers for interstate interconnection are severable from rates charged for intrastate interconnection.^{35/} Here, as in Louisiana PSC, severability is possible. Thus, the Commission cannot by-pass the question of separability and claim complete control over LEC-CMRS interconnection rates. A regulatory model that includes direct regulation of intrastate rates charged by LECs for LEC-CMRS interconnections (such as suggested in NPRM ¶ 110) must be rejected, as noted above.

^{34/} In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379 Declaratory Ruling, 2 FCC Rcd 2910, 2912 (1987). Were the Commission to assert the right to regulate rates for all LEC-CMRS interconnection on the theory that CMRS service is not severable, provisions of Section 252, enacted only last month, as they apply to pricing of LEC-CMRS interconnection would be negated. This would do grave harm to Congress' clear intent to delegate to the states the ratemaking responsibility for LEC-CMRS interconnection.

^{35/} If the Commission were to change its policies so as to strip state regulatory agencies of rate authority and supplant current LEC-CMRS interconnection rates with a "bill-and-keep" policy, state regulators would be confronted with an approximately billion dollar revenue shortfall; that is, the approximately billion dollars in revenues currently paid by CMRS providers would be shifted -- either to local subscribers, or if state regulators do not act to adjust local rates, to LEC shareholders, which could adversely affect the LECs' ability to raise capital. In the interim, CMRS providers -- and their shareholders and/or subscribers -- would enjoy a substantial and unjustifiable subsidy. (Compare 47 U.S.C. Section 254(k) ("A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition"))).

IV. CONCLUSION

The proponents of Commission preemption of state regulation of intrastate LEC rates charged to CMRS providers have utterly failed to point to any provision of the Communications Act as amended which authorizes Commission regulation of intrastate LEC rates or to any evidence that demonstrates that such regulation is necessary to permit CMRS entry. The Commission's current guidelines which require that interconnection rates meet minimum standards as necessary to assure entry, and which have not been shown to be ineffective, strike an appropriate balance by promoting achievement of the federal goal, without preempting states from acting within the sphere of jurisdiction specifically reserved to them. Such an approach is consistent with the new mandate prescribed by Congress in the 1996 Act which provides states with jurisdiction in the first instance over LEC-CMRS interconnection agreements, including rates. Given the record before the Commission, the most compelling portion of which demonstrates that the CMRS industry is successful by any measure, there is simply no factual or legal predicate that would support a fundamental change in regulatory policy in favor of a new policy premised on federal preemption of state regulation of intrastate rates for interconnection. To the extent that problems with respect to LEC-CMRS interconnection do exist, they can best be addressed in a comprehensive fashion through federal and state implementation of the 1996 Act. Contrary to the claims of CMRS providers, preemption of state jurisdiction over LEC intrastate interconnection rates and imposition of "bill and keep" is neither needed nor lawful.

CERTIFICATE OF SERVICE

I, Susan Sonnenberg, hereby certify that on the 25th day of March, 1996, a copy of the foregoing NYNEX Reply Comments in CC Docket Nos. 95-185/94-54 was served on each of the parties listed on the attached Service List by first class U.S. mail, postage prepaid.

Susan Sonnenberg
Susan Sonnenberg

John T. Scott, III
Crowell & Moring
10001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Attorneys for Bell Atlantic NYNEX Mobile, Inc.,

James D. Ellis
Robert M. Lynch
Wayne Watts
David F. Brown
175 E. Houston
Room 1254
San Antonio, TX 78205
Attorneys for SBC Communications, Inc.

Lucille M. Mates
Jeffrey B. Thomas
Sarah Rubenstein
140 New Montgomery Street, Rm. 1529
San Francisco, California 94105
Attorneys for Pacific Bell, Pacific Bell Mobile Services,
Nevada Bell

James G. Pachulski
1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201
Attorney for The Bell Atlantic Telephone Companies

Frank M. Panek
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025
Room 4H84
Attorney for Ameritech

Jeffrey S. Bork
Robert B. McKenna
U.S. West, Inc.
1020 19th Street, N.W., Suite 700
Washington, D.C. 20036

Lisa M. Zaina
General Counsel
OPASTCO
21 Dupont Circle, N.W.
Washington, D.C. 20036

Richard S. Myers
Myers Keller Communications Law Group
1030 15th Street, N.W.
Suite 908
Washington, D.C. 20005
Attorney for Southeast Telephone Limited
Partnership, LTD.

David L. Hill
Audrey P. Rasmussen
O'Connor & Hannan, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006-3483
Attorneys for Florida Cellular RSA Limited Partnership

Jay L. Birnbaum
David H. Pawlik
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005
Attorneys for Cellular Communications
of Puerto Rico, Inc.

James F. Rogers
Steven H. Schulman
of LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
Attorneys for Vanguard Cellular Systems, Inc.

Michael R. Bennet
Caressa D. Bennet
Bennet & Bennet, PLLC
1831 Ontario Place, NW.
Suite 200
Washington, D.C. 20009
Attorneys for Cellular Mobile Systems of St. Cloud
General Partnership

J. Manning Lee
Vice President, Regulatory Affairs
Two Teleport Drive, Suite 300
Staten Island, New York 10311
Attorney for Teleport Communications Group Inc.

Joe D. Edge
Mark F. Dever
Drinker Biddle & Reath
901 Fifteenth Street, N.W.
Washington, D.C. 20005
Attorneys for Puerto Rico Telephone Company

Michael J. Ettner
Jody B. Burton
General Services Administration
18th & F Streets, N.W., Room 4002
Washington, D.C. 20405

Richard P. Ekstrand, President
P.O. Box 1027
2819 Highway 29S.
Alexandria, MN 56308
Attorney for Rural Cellular Corporation

Frederick M. Joyce
Amy Brett
Joyce & Jacobs, Attys. at Law, LLP
1019 19th Street, N.W.
14th Floor, PH-2
Washington, D.C. 20036

Mark J. Tauber
Mark J. O'Connor
Piper & Marbury, L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036
Attorneys for OMNIPOINT Corporation

Charles H. Helein, General Counsel
Helein & Associates
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
Attorney for America's Carriers
Telecommunication Assn.

Adam A. Andersen
Senior counsel
CMT Partners
651 Gateway Boulevard, 15th floor
South San Francisco, CA 94080

Thomas Gutierrez
Lukas, McGowan, Nace & Gutierrez, Chartered
Suite 1200
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for CMT Partners

John A. Malloy, Esq.
Leo R. Fitzsimon, Esq.
GO Communications Corporation
201 North Union Street, Suite 410
Alexandria, Virginia 22314

Alan R. Shark, President
Elizabeth R. Sachs, Esq.
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, NW., Suite 1200
Washington, D.C. 20036
Attorneys for American Mobile Telecommunications
Association, Inc.

Charles C. Hunter
Laura C. Mow
Terry F. Berman
Hunter & Mow, PC.
1620 I. Street, N.W., Suite 701
Washington, D.C. 20006
Attorneys for Telecommunications Resellers Assoc.

Steven T. Nourse
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-8764
Attorney for Public Utilities Commission of Ohio

Larry A. Blosser
Donald J. Elardo
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for MCI Telecommunications Corporation

Jay L. Birnbaum
Jeffrey A. Brueggeman
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005
Attorneys for New Par

Cheryl A. Tritt
Stephen J. Kim
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
Attorneys for ICO Global Communications Limited

Glenn S. Rabin
Federal Regulatory counsel
ALLTEL Corporate Services, Inc.
655 15th Street, N.W.
Suite 220
Washington, D.C. 20005

Richard A. Askoff
100 South Jefferson Road
Whippany, New Jersey 07981
Attorney for National Exchange Carrier
Association, Inc.

Reginald J. Smith
Connecticut Department of Public Utility Control
One Central Park Plaza
New Britain, CT 06051

Michael S. Fox
Director, Regulatory Affairs
John Staurulakis, Inc.
6315 Seabrook Road
Seabrook, Maryland 20706

Michael S. Fox
Director, Regulatory Affairs
John Staurulakis, Inc.
H. Keith Oliver
Accounting Manager
Home Telephone Company, Inc.
200 Tram Street
Moncks Corner, SC 29461

David M. Wilson, Esq.
Young, Vogl, Harlick, Wilson & Simpson LLP
425 California Street, Suite 2500
San Francisco, CA 94104
Attorneys for The Westlink Company

Larry A. Blosser
Donald J. Elardo
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for MCI Telecommunications Corporation

Richard S. Myers
Myers Keller Communications Law Group
1030 15th Street, N.W., Suite 908
Washington, D.C. 20005
Attorney for Alaska-3 Cellular LLC
DBA Cellular One

Dwane Glancy, Treasurer
Smithville Telephone Company
1600 West Temperance Street
Ellettsville, Indiana 47429

Mickey Sims, General Manager and CEO
Poka Lambro Telephone Cooperative, Inc.
P.O. Box 1340
Tahoka, Texas 79373-1340

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
1850 M. Street, N.W.
Washington, D.C. 20036
Attorneys for Sprint Corporation

Michael F. Altschul
Randall S. Coleman
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
Attorneys for Cellular Telecommunications Industry
Association

Genevieve Morelli
Vice President & General Counsel
The Competitive Telecommunications Association
1140 Connecticut Avenue, N.W., Suite 220
Washington, D.C. 20036

Danny E. Adams
Edward A. Yorkgitis, Jr.
Kelley, Drye & Warren
1200 Nineteenth Street, N.W., suite 500
Washington, D.C. 20036
Attorneys for The Competitive Telecommunications
Association

Jonathan M. Chambers
Vice President of Public Affairs
Sprint Spectrum, L.P.
1801 K Street, N.W., Suite M-112
Washington, D.C. 20036

Anne P. Schelle
Vice President, External Affairs
American PCS, L.P.
6901 Rockledge Drive, Suite 600
Bethesda, Maryland 20817

Jonathan D. Blake
Kurt A. Wimmer
Gerard J. Waldron
John F. Duffy
Donna M. Epps
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Attorneys for Sprint Spectrum and
American Personal Communications

Anne Schelle
Vice President, External Affairs
American Personal Communications
6901 Rockledge Drive
Suite 600
Bethesda, Maryland 20817

Mary McDermott
Linda Kent
Charles D. Cosson
U.S. Telephone Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

Werner K. Hartenberger
Laura H. Phillips
Richard S. Denning
Christina H. Burrow
Dow, Lohnes & Albertson
A Professional Limited Liability Company
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
Attorneys for Cox Enterprises, Inc.

Andre J. Lachance
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Kevin C. Gallagher
Senior Vice President-General Counsel and Secretary
360° Communications Company
8725 Higgins Road
Chicago, IL 60631

Robert Cohen
The Personal Communications Industry Association
1019 19th Street, N.W., Suite 1100
Washington, D.C. 20036-5105

John Hearne, Chairman
Point Communications Company
100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401

William D. Baskett III
Thomas E. Taylor
David S. Bence
2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45201-5715
Attorneys for Cincinnati Bell Telephone Company

Robert A. Hart IV
Owner of Hart Engineers &
CEO of 21st Century Telesis, Inc.
Hart Engineers
4615 North Boulevard
Baton Rouge, Louisiana 70806

Richard L. Oberforfer
Haley, Bader & Potts
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
Attorney for Western Radio Services Co., Inc.

Michael J. Shortley, III
Attorney for Frontier Corporation
180 South Clinton Avenue
Rochester, New York 14646

James Rowe
Executive Director
Alaska Telephone Association
4341 B Street, Suite 304
Anchorage, Alaska 99503

James A. Crary
Senior Attorney
600 Telephone Avenue
Anchorage, Alaska 99503
Attorney for Anchorage Telephone Utility

David M. Wilson, Esq.
Young, Vogl, Harlick, Wilson & Simpson LLP
425 California Street, Suite 2500
San Francisco, CA 94104
Attorneys For The Allied Personal Communications
Industry Association of California

David R. Poe
Catherine P. McCarthy
Yvonne M. Coviello
LeBoeuf, Lamb, Greene & MacRae L.L.P.
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728
Attorneys for Time Warner Communications
Holdings, Inc.

Donald F. Shepherd
Time Warner Communications Holdings, Inc.
300 First Stamford Place
Stamford, Connecticut 06902

Scott K. Morris
Cathleen A. Massey
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036

Mark C. Rosenblum
Judy Sello
Room 3244J1
295 North Maple Avenue
Basking Ridge, New Jersey 07920
Attorneys for AT&T Corp.

Maureen O. Helmer
General Counsel
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

David A. Gross
Kathleen Q. Abernathy
AirTouch Communications, Inc.
1818 N Street, N.W., Suite 800
Washington, D.C. 20036

Michael Mowery
Pamela Riley
AirTouch Communications, Inc.
One California Street
San Francisco, CA 94105

Judith St. Ledger-Roty
Jonathan E. Canis
Paul G. Madison
Reed Smith Shaw & McClay
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
Attorneys for Paging Network, Inc.

Catherine R. Sloan
Richard L. Fruchterman
Richard S. Whitt
Worldcom, Inc.
d/b/a LDDS WorldCom
1120 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Robert S. Foosaner
Lawrence L. Holloway
Nextel Communications, Inc.
800 Connecticut Avenue, N.W.
Suite 1001
Washington, D.C. 20006

Gene DeJordy, Esq.
Christopher Johnson
Western Wireless Corporation
330 120th Ave., N.E. - Suite 200
Bellevue, WA 98005

Carl W. Northrop
Christine M. Crowe
Bryan Cave LLP
700 Thirteenth Street, N.W.
Suite 700
Washington, D.C. 20005-3960
Attorneys for ARCH Communications Group, Inc.

Richard P. Thayer
James A. Sanborn
13 Central Street
P.O. box 577
Farmington, NH 03835
Attorneys for Union Telephone Company

Susan W. Smith
Director, External Affairs
Century Cellunet, Inc.
3050 Summerhill, #4
Texarkana, TX 75501

Barry R. Rubens
Senior Vice President
Finance & External Affairs
68 Cabarrus Avenue, East
Post Office Box 227
North Carolina 28026-0227
Attorney for Concord Telephone Company

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
Attorney for GTE Service Corporation,
on behalf of its affiliated telephone and wireless companies

Richard McKenna, HQE03J36
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092

Margaret E. Garber
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Attorney for Pacific Bell, Pacific Bell Mobile Services
and Nevada Bell